FILED
APR 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1130

IN THE

Supreme Court of the United States

FRANCIS EDWIN FROELICH,

Petitioner,

v.

THE LEWIS LAW FIRM, P.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Francis Edwin Froelich, a prolific litigant who is both an attorney and a physician, invokes this Court's jurisdiction to challenge the adequacy of the due process afforded to him by the Circuit Court of Fairfax County, Virginia, in a dispute over the legal fees owed by him to his former attorneys in a hotly-contested divorce proceeding.

Froelich has previously litigated this matter in the Circuit Court (which held four hearings on the matter), the Court of Appeals of Virginia, the Supreme Court of Virginia, the Virginia Fee Arbitration Committee, the District of Columbia Attorney/Client Arbitration Board, and the United States District Court for the Eastern District of Virginia (in which one of his two collateral attacks remains pending). Froelich now reprises his federal due process arguments in this Court. The questions presented in Froelich's petition for certiorari are:

1. Whether this Court should grant certiorari to review state-court proceedings about which the petition addresses no misstatement of law below and thus identifies no conflict with any other court.

2. Whether this Court should grant certiorari to address Froelich's allegations of errors when Froelich has failed to preserve any issues on appeal by filing a transcript or statement of facts as required by Virginia law.

3. Whether this Court should grant certiorari to determine whether the extent of the hearing and briefing afforded to Froelich by the Circuit Court violated Froelich's due process rights under the United States Constitution.

RULE 29.6 STATEMENT

Respondent is a professional corporation. No parent or publicly held corporation owns 10 percent or more of Respondent's stock.

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INTRODUCTION

The petition in this case is the latest effort by Francis Edwin Froelich to avoid fees and costs owed by him to his former attorneys at The Lewis Law Firm (the "Firm"). Froelich presents strained constitutional challenges to the due process afforded to him in connection with a series of hearings and briefings on this fee dispute in the Circuit Court of Fairfax County, Virginia.

Throughout this litigation, Froelich has taken extraordinary measures to avoid his debt, litigating extensively before the Circuit Court (which held four hearings on the matter), the Court of Appeals of Virginia, the Supreme Court of Virginia, the Virginia Fee Arbitration Committee, the District of Columbia Attorney/Client Arbitration Board, and the United States District Court for the Eastern District of Virginia. Froelich now reprises his federal constitutional challenges in this Court.

Froelich's petition should be denied for two threshold reasons. First, Froelich's petition focuses on factual and evidentiary questions below and does not raise certworthy issues. Second, as previously suggested by the Court of Appeals of Virginia, Opp. App. 2a,[1] Froelich has not preserved any issues on appeal by virtue of his failure to file a transcript or statement of facts as required by Virginia law.

Even if this Court were inclined to delve into factual minutiae and consider matters not properly preserved below, Froelich's constitutional challenge does not stand on its merits. Froelich incredibly

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[1] "Pet. App." refers to the appendices that follow Froelich's petition. "Opp. App." refers to the appendices that follow this brief in opposition.

argues that he was not afforded due process in a proceeding in which he was allowed no fewer than eight opportunities to present briefing, argument, and evidence. Therefore, the petition should likewise be denied on its merits.

COUNTERSTATEMENT

On August 12, 2004, Froelich executed a retainer agreement with the Firm in which he agreed to pay the Firm for legal services, costs, and expenses in connection with his dissolution of marriage action before the Circuit Court of Fairfax County, Virginia. Froelich then advanced $100,000 to the Firm under that agreement to cover future legal fees and costs.

For the following year, the Firm provided ongoing representation and counsel to Froelich with respect to various aspects of his hotly-contested divorce proceeding, tax liabilities, and other matters. Record 14-353.[2] Froelich, who is himself a practicing attorney and a licensed physician, was actively involved in these matters and enthusiastically directed this multi-faceted engagement with full knowledge of its mounting costs, which had been detailed in regular billing statements sent by the Firm to Froelich. Record 630-723, ex. B.

After the funds previously advanced by Froelich were exhausted, the Firm repeatedly requested that Froelich begin to pay his legal bills, which increased each month. Froelich, who was still actively involved in directing his complex case and with full knowledge of the fees and costs being incurred, explained that he intended to pay the Firm's bills in full but, due to

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[2] "Record" refers to the record of proceedings in the Circuit Court of Fairfax County, Virginia, as compiled and submitted to the Supreme Court of Virginia.

"temporary illiquidity," could not do so until his divorce became final. Accepting that explanation, and as an accommodation to Froelich, the Firm delayed taking further action on this debt upon receiving a promissory note with confession of judgment from Froelich for $82,604.93, dated August 5, 2006.

In the following months, the Firm continued to represent Froelich, and Froelich continued to demand intensive advice, counsel, strategy, drafting, and other assistance on numerous matters. As Froelich's debt to the Firm increased, Froelich stopped responding to repeated inquiries from the Firm regarding payment of his debt. Finally, the Firm filed its motion for leave to withdraw as counsel on September 30, 2005. Record 350-53. To secure its interest in the proceeds of Froelich's divorce settlement, the Firm filed a notice of charging lien in the amount of $137,690.06 on November 7, 2005. Pet. App. 12a.

Having completed the bulk of the legal work in connection with Froelich's divorce, the Firm received leave of court to withdraw as Froelich's counsel on December 8, 2005. Record 383-84. Froelich and his ex-wife were divorced on December 14, 2005. Record 400-24.

On December 22, 2005, Paul R. Smollar, Esquire, counsel for Froelich's ex-wife, filed a "Motion for Declaratory Judgment and/or Guidance" asking for the Circuit Court's direction regarding stock worth approximately $73,544.00 that his client owed to Froelich pursuant to the terms of the marital settlement agreement. Record 425-29. The Firm filed its response to that motion on January 5, 2006,

asserting its claim to that stock in partial satisfaction of its lien. Record 430-31. Froelich did not file any paper in opposition to that motion before the hearing in the Circuit Court on January 6, 2006.

On January 6, 2006, the Circuit Court heard oral argument from Froelich and the Firm on Mr. Smollar's motion and the Firm's claim. When Froelich demanded additional opportunity to state his defenses, the Court permitted additional hearing and briefing from Froelich and from the Firm regarding the lien and the outstanding debt.

On January 20, 2006, Froelich filed his memorandum opposing the Firm's lien. Record 432-59. In a shotgun approach, Froelich asserted arguments regarding Fourteenth Amendment due process and claims for civil rights violations under 42 U.S.C. § 1983. The memorandum also set out Froelich's equally flawed arguments on the substance of the fee dispute: (1) that the Firm's fees exceeded those charged by his ex-wife's attorneys and (2) that the fees were excessive when compared to his share of the marital estate. Record 433. Despite having ample notice and opportunity to do so, Froelich did not challenge any of the billing statements he had received from the Firm or any of the line items therein, which detail the extensive work that the Firm performed on his behalf and at his explicit direction. Record 630-723, ex. B.

The Firm filed its responsive memorandum in support of its lien on January 27, 2006. Record 460-561. This response also addressed the merits of the fee dispute. It explained that Froelich's high legal expenses resulted from his own conduct with respect to the litigation. It established that these expenses

were expressly authorized and ratified by Froelich through his retainer agreement, the fee advance, the promissory note, and his rejection of advice from counsel that any possible benefit from his aggressive litigation strategies would not likely exceed the high cost of implementing them. It also described the Firm's detailed billing practices and noted that Froelich has never identified any error on those bills or questioned those charges.

On February 3, 2006, the Circuit Court ruled on the validity of the Firm's lien, denied Froelich's claims (as reflected in the transcript not properly filed by Froelich to preserve any issues on appeal), and entered an Order "grant[ing] The Lewis Law Firm, P.C. leave of court to file a petition to enforce its attorney's lien against the Defendant." Pet. App. 3a. Pursuant to that order, Mr. Smollar created two escrow accounts to hold the marital property claimed by the Firm in satisfaction of the debt.

Although Froelich did not present any arbitration demand to the Circuit Court at the February 3 hearing, he attempted on several occasions to initiate arbitration proceedings in improper forums. On February 2, 2006, Froelich submitted an arbitration demand and consent to arbitrate a fee dispute with the Firm before the Virginia Fee Arbitration Committee. Four days later, on February 6, 2006, Froelich withdrew this arbitration demand. Also on February 6, Froelich submitted an Agreement to Arbitrate to the District of Columbia Attorney/Client Arbitration Board (the "ACAB").

On January 19, 2007, the Firm requested that the Circuit Court permit it to execute on its judgment against Froelich and bar him from further efforts to

arbitrate a dispute that was already properly before that court. Record 565-87. That matter was set for hearing in the Circuit Court on February 2, 2007. Less than one week before that scheduled hearing, Froelich filed an emergency motion in the United States District Court for the Eastern District of Virginia seeking to stop the Circuit Court hearing. On the day before the Circuit Court hearing, the District Court, *sua sponte*, found that the matter was properly before the Circuit Court and dismissed Froelich's federal lawsuit. Pet. App. 24a.

Upon hearing further arguments from Froelich and the Firm on February 2, 2007, the Circuit Court permitted the Firm to collect its debt and ordered that Froelich drop any further arbitration demands. Pet. App. 5a.[3] Accordingly, on February 12, 2007, the ACAB dismissed Froelich's arbitration demand. Pet. App. 21a.

On February 22, 2007, Froelich filed a Notice of Appeal to the Court of Appeals of Virginia from the Circuit Court's February 2, 2007, Order. Record 589-91. Although Froelich's Notice of Appeal specifically indicated that he would file a transcript and statement of facts, Record 589-91, he did not do so at that time or at any time before April 3, 2007, which marked the end of the 60-day period for filing such documents under Rules 5:11 and 5A:8 of the Supreme Court of Virginia. Accordingly, on May 14,

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[3] Froelich's petition repeatedly suggests that he requested but was denied hearings on his objections in the Circuit Court proceedings. *E.g.* Pet. 8, 11, 21-23. In fact, Froelich was given extraordinary latitude at numerous hearings to present arguments and evidence, and the Firm specifically objects to any contrary assertion by Froelich pursuant to Supreme Court Rule 15.2.

2007, the Court of Appeals, *sua sponte*, entered an order requiring Froelich to show cause why this failure to comply with the Rules did not amount to a failure to preserve any issues on appeal. Opp. App. 2a.

On May 29, 2007, Froelich filed a "Memorandum to Show Cause" and "Motion for Lieve [sic] to Strike Submission and Substitute" in response to the Court of Appeals' order. On May 30, 2007, before the Firm had an opportunity to respond, the Court of Appeals transferred Froelich's appeal to the Supreme Court of Virginia without considering Froelich's response to the order to show cause. Opp. App. 1a.

On November 13, 2007, the Supreme Court of Virginia held that there is no reversible error in the judgment complained of by Froelich. Pet. App. 1a.[4]

REASONS FOR DENYING THE WRIT

Froelich's petition belies his assertion that this case presents important federal questions warranting this Court's attention. Indeed, Froelich's argument

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[4] In response to the Supreme Court of Virginia's ruling, Froelich has unleashed a flurry of new litigation challenging the Firm's judgment. In addition to filing his petition in this Court, Froelich also filed yet another collateral challenge in the United States District Court for the Eastern District of Virginia, seeking in a six-count complaint to overturn the judgment below on the basis of alleged violations of his constitutional rights, 42 U.S.C. § 1983, and RICO, 18 U.S.C. §§ 1961 *et seq.* First Amended Complaint, *Froelich v. The Lewis Law Firm, P.C.*, No. 07-cv-01230-CMH-BRP (Feb. 1, 2008). Disregarding the Supreme Court of Virginia's disposition of this matter, Froelich also boldly returned to the Circuit Court on December 19, 2007, with a motion to "clarif[y]" or "reconsider and modify" the judgment that had just been upheld on appeal in Virginia's highest court.

focuses entirely on the (disputed) factual sufficiency of the hearings held below and identifies no novel or unsettled issues of law. But this Court sits to settle important questions of federal law, not as an additional appellate option for disappointed state-court litigants.

The writ should also be denied on the basis that the issues presented were not properly preserved in the courts of Virginia and that the "record" of hearings below (which was not properly preserved) discloses that Froelich was afforded due process that far exceeds federal constitutional minimums.

I. FROELICH'S PETITION DOES NOT RAISE CERTWORTHY ISSUES.

Froelich's petition focuses exclusively on the details of the numerous hearings held in the Circuit Court of Fairfax County, Virginia, and whether those hearings, taken together, afforded him the level of constitutional due process required by the Fourteenth Amendment. The petition does not suggest that any Virginia court improperly stated any rule of law or that any principle of law articulated by any Virginia court is in conflict with any statement of law by any other court. Simply put, Froelich's disagreement with the Virginia courts is over whether the numerous opportunities for hearing and briefing afforded to him met the minimum level of due process required by the federal constitution.

Even if valid, such a narrow disagreement over the factual sufficiency of a litigant's opportunity to be heard does not warrant review by this Court. S. Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of

law"); *cf. United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts").

II. FROELICH HAS FAILED TO PRESERVE ANY ISSUES ON APPEAL.

Froelich's failure timely (or ever) to file a transcript or statement of facts of the proceedings in the Circuit Court acts to bar both federal and state appellate review of any issues with respect to the sufficiency of the hearings whose record was not properly preserved. Froelich noticed his appeal from the Circuit Court's February 2, 2007, order on February 22, 2007. However, as suggested by the Court of Appeals of Virginia, Opp. App. 2a, he failed to file a transcript or statement of facts as required by Rules 5:11 and 5A:8 of the Supreme Court of Virginia. "The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment." Va. S. Ct. Rules 5:11, 5A:8. "The times prescribed for filing * * * the transcript or written statement (Rule 5:11) * * * are mandatory." Va. S. Ct. Rule 5:5(a).

This Court has long held that it will consider only those federal questions that have been properly preserved and specifically presented at each stage of the state-court litigation below. *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 343-44 (1920). Likewise, the Supreme Court of Virginia has held that "the judgment of the lower court is presumed to be correct and the burden is on the appellant to present to us a sufficient record from which we can determine whether the lower court has erred in the respect complained of." *Justis v. Young*,

119 S.E.2d 255, 256-57 (Va. 1961). Failure to provide a record sufficient for appellate review is a defect that requires dismissal of the appeal or affirmation of the lower court's judgment. *See id.; Commonwealth v. Williams*, 553 S.E.2d 760, 764 (Va. 2001) (without a transcript from the lower court hearing, "we are unable to determine whether the circuit court conducted an adequate inquiry"). *See also Jenkins v. Dir. of Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 455 (Va. 2006) (dismissal for failure timely to file transcripts); *McDonald v. National Enters., Inc.*, 547 S.E.2d 204, 211 (Va. 2001) (same); *White v. Morano*, 452 S.E.2d 856, 858 (Va. 1995) ("If an insufficient record is furnished, the judgment appealed from will be affirmed."). Under Virginia Supreme Court Rule 5:11, dismissal is an appropriate remedy where the appellant has failed to preserve any issues on appeal by not timely filing a transcript or statement of facts. *See In re Moseley*, 643 S.E.2d 190, 192 n.1 (Va. 2007) ("Court dismissed the petition for appeal under Rule 5:11 for failure to timely file a transcript or written statement of facts.").

Moreover, the absence of a transcript or statement of facts is fatal to Froelich's ability to argue that any ruling in the Circuit Court was met with a specific, contemporaneous objection. *See* Va. S. Ct. Rule 5:25 ("Error will not be sustained to any ruling of the trial court * * * unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."); *Nusbaum v. Berlin*, 641 S.E.2d 494, 503 (Va. 2007) (requiring record of specific, contemporaneous objection to preserve issue on appeal). *See also McDonald v. Commonwealth*, 645

S.E.2d 918, 921 (Va. 2007) (Court will not consider issues not preserved for appeal before trial court); *Alexandria City Council v. Mirant Potomac River, LLC*, 643 S.E.2d 203, 207 (Va. 2007) (same).

Before this appeal was transferred to the Supreme Court of Virginia, the Court of Appeals of Virginia suggested these fundamental defects in Froelich's appeal. On May 14, 2007, it ordered, *sua sponte*, that Froelich show cause why his failure to comply with the provisions of Virginia Supreme Court Rule 5A:8 analogous to Rule 5:11 would not require the Court of Appeals to dismiss his appeal. Opp. App. 2a. Froelich filed a response to that order, but the Court of Appeals transferred Froelich's appeal to the Supreme Court of Virginia on May 30, 2007, before ruling on the sufficiency of Froelich's response. Opp. App. 1a. The Court of Appeals' transfer prior to ruling on its order to show cause does not save Froelich from his failure to preserve his record on appeal, and this Court should deny the petition for this threshold reason alone.

III. FROELICH'S DUE PROCESS RIGHTS WERE PROTECTED.

Froelich had no fewer than eight opportunities to address the Circuit Court of Fairfax County, Virginia, on the merits of this matter, and he did so on six occasions with extensive briefing and oral argument. Although the transcripts of these hearings are not properly before this Court due to Froelich's failure to file them below, even the "record" that does exist demonstrates that Froelich was afforded more than ample opportunity to make arguments and present evidence in his defense. Accordingly, Froelich's due process challenges under

the Fourteenth Amendment to the United States Constitution are without merit and should be rejected.

The Circuit Court was exceedingly solicitous in its attention to Froelich's defenses, giving him at least eight opportunities to address the merits of the fee dispute: (1) briefing in opposition to his ex-wife's motion filed December 22, 2005 (Record 425-29); (2) oral argument on January 6, 2006; (3) supplemental briefing on January 20, 2006 (Record 432-59); (4) oral argument on February 3, 2006; (5) briefing in opposition to the Firm's petition filed January 19, 2007 (Record 566-87); (6) oral argument on February 2, 2007; (7) briefing in opposition to the Firm's petition to release funds pending appeal filed April 3, 2007 (Record 617-26); and (8) oral argument on April 10, 2007. Froelich addressed the court on six of these occasions (2, 3, 4, 6, 7, and 8), including the oral argument by his retained attorney, Theodore S. Allison, on April 10, 2007. As explained above, the transcripts of these hearings (2, 4, 6, and 8) are not properly before this Court on appeal. If they were, however, they would even more effectively debunk Froelich's due process arguments by showing that he was afforded well more than the minimum opportunity required by the Constitution to present arguments and evidence in his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 2008

APPENDIX

APPENDIX A

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 30th *day of* May, 2007.

Record No. 0496-07-4

Circuit Court No. CL-07-879

Francis Edwin Froelich, Appellant,

against

The Lewis Law Firm, Appellee.

From the Circuit Court of Fairfax County

It appears that this Court does not have jurisdiction over this case. Accordingly, the case hereby is transferred to the Supreme Court of Virginia pursuant to Code § 8.01-677.1.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ [Illegible]

Deputy Clerk

APPENDIX B

VIRGINIA:

In the Court of Appeals of Virginia on Monday *the* 14th *day of* May, 2007.

Record No. 0496-07-4

Circuit Court No. CL-07-879

Francis Edwin Froelich, Appellant,

against

The Lewis Law Firm, Appellee.

From the Circuit Court of Fairfax County

On preliminary examination, the Court concludes that neither a transcript nor statement of facts was timely filed in this case, *see* Rule 5A:8, and that no extension of time in which to file a transcript or statement of facts is now possible, *Jordan v. Price*, 3 Va. App. 672, 353 S.E.2d 168 (1987). While the absence of the transcript or statement of facts does not always deprive this Court of jurisdiction, the Court will consider only those issues which may be decided without reference to a transcript or statement of facts. When a transcript is indispensable to the determination of an issue, the absence thereof in the record is a jurisdictional defect and requires dismissal of the claim. *See Goodpasture v. Goodpasture*, 7 Va. App. 55, 57, 371 S.E.2d 845, 846 (1988) (family law case saved from dismissal by judge's letter opinion, other documents). *E.g.*, *Anderson v. Commonwealth*, 13 Va. App. 506, 413 S.E.2d 75 (1992) (statement of facts in criminal case); *Turner v. Commonwealth*, 2 Va. App. 96, 341 S.E.2d 400 (1986) (transcript in criminal case); *Barrett v.*

Barrett. 1 Va. App. 378, 380, 339 S.E.2d 208, 210 (1986) (neither filed).

Accordingly, it is ordered that appellant shall show cause, by a reply to this order on or before May 29, 2007, why this appeal should not be dismissed. In any response to this order, appellant shall state clearly any questions properly presented by this appeal, *see* Rules 5A:12(c) and 5A:20(c), and preserved for appellate review, *see* Rule 5A:18, which can be considered without resort to the transcript or statement of facts. Appellant shall further explain why the questions can be decided without reference to the transcript or statement of facts.

The period for filing pleadings shall not be enlarged by this order.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Rosellis J. Graham

Deputy Clerk